MALAYSIA AIRPORTS (SEPANG) SDN BHD v. AIRASIA X BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIMAH OMAR J
[WRIT ACTION NO: WA-22NCVC-817-12-2018]
18 JULY 2019

CIVIL PROCEDURE: *Proceedings – Claim – Aviation – Imposition of new increased passenger service charge ('PSC') rate – Claim for outstanding PSC owed by provider of air transport services – Whether there was actual dispute between parties regarding imposition of new increased PSC rate – Whether challenge mounted against correct party – Whether imposition of new increased PSC rate a statutory decision – Whether party disputing PSC rate ought to commence judicial review against decision to increase rate – Malaysian Aviation Commission Act 2015*

CIVIL PROCEDURE: *Summary judgment – Triable issues – Imposition of new increased passenger service charge ('PSC') rate – Claim for outstanding PSC owed by provider of air transport services – Whether there was actual dispute between parties regarding imposition of new increased PSC rate – Whether there were triable issues – Whether summary judgment ought to be granted – Rules of Court 2012, O. 14*

The plaintiff managed, operated, maintained and provided aviation and passenger related services at the Kuala Lumpur International Airport ('KLIA') which included the klia 2 Terminal ('klia 2'). The defendant was a provider of air transport services and a user of the aviation related services made available by the plaintiff at the KLIA and klia 2. Pursuant to s. 24A of the Civil Aviation Act 1969 ('CAA'), the Minister of Transport granted the plaintiff a license to manage, operate, maintain and develop the airports for a period from 12 February 2009 to 11 February 2034 ('license'). Pursuant to s. 100 of the Malaysian Aviation Commission Act 2015 ('MACA'), the license issued under the CAA shall continue to be authorised under the MACA. In 2010, the plaintiff and the defendant ('parties') entered into a contract known as 'Conditions for Use for Kuala Lumpur International Airport Malaysia' ('COU 2010') to, *inter alia*, govern the defendant's use of KLIA. At all times, the plaintiff referred to and relied upon the provisions of the COU 2010 and the defendant did not challenge the applicability of the same. In 2017, pursuant to article 1(c) of the COU 2010, the plaintiff invited all the airlines, including the defendant, to a consultation regarding the proposed amendments to the terms and conditions of the COU 2010 ('meeting') which were contained in the COU 2017. The defendant had no objections and accepted the terms and conditions of the COU 2017 by continuing to use the KLIA and the airport services and facilities even after receiving notification about the amendments. Malaysia Airports Holding Bhd ('MAHB'), on behalf of the plaintiff, informed all relevant airlines including the defendant of the present Passenger Service Charge ('PSC') Regulation determined by the Malaysian Aviation Commission

('MAVCOM') and that the new PSC rate for non-ASEAN international destinations from klia 2 would be applicable for all tickets issued from 1 February 2018. The new PSC would be applicable for tickets issued from 1 July 2018 onwards. Following the imposition of the new prescribed rate, the plaintiff subsequently issued to the defendant PSC invoices for the period between 1 July 2018 and 21 October 2018 based on the new PSC rate. However, the defendant continued to pay the plaintiff the old PSC rate, leaving an outstanding sum of RM26,718,142 by the defendant being the difference between the PSC sum calculated on the new and the old PSC rate. This prompted the plaintiff to commence the present action to recover the outstanding PSC owed by the defendant. Concurrent with the present action, the plaintiff also commenced two other civil suits. All three suits pertained to the issue of payment of the PSC payable to the plaintiff for providing aviation and passenger related facilities, infrastructure and services to the defendant. Objecting to the claim, the defendant argued that, *inter alia*, (i) the imposition of the increased PSC rate on the principal ground that the plaintiff's action was misconceived, invalid and/or premature as the plaintiff had not complied with/or availed itself of the statutory provisions for dispute resolutions within the MACA; (ii) since there existed disputes regarding the imposition of the new PSC rate, such dispute must be dealt with according to the procedure provided under the MACA; (iii) under the MACA, such disputes are to be mediated and should the mediation be unsuccessful, the disputes must then be referred to the MAVCOM and any decision made by the MAVCOM is subject to appeal to the High Court. Unless and until such procedures were complied with or exhausted by the plaintiff, the court would have no jurisdiction to determine the plaintiff's suit; and (iv) the defendant was not bound by the terms stated in COU 2010 and COU 2017 as it had never accepted them. The plaintiff applied for a summary judgment, under O. 14 of the Rules of Court 2012, on the grounds that the issues raised by the defendant did not amount to triable issues and did not merit a full blown trial ('encl. 6'). The primary issue that arose for adjudication was whether there was actually a dispute between the plaintiff and the defendant regarding the imposition of the new increased PSC rate.

Held (allowing encl. 6):

(1) The PSC rate was determined by the MAVCOM. The MAVCOM is not a provider of aviation services. Pursuant to s. 46 of the MACA, the MAVCOM is vested with exclusive statutory authority to regulate the charges for aviation services which specifically include the prevailing PSC. Therefore, the MAVCOM was exercising its statutory authority and duty as prescribed under the MACA. The plaintiff had no hand at all in the determination of the prevailing PSC rate. (paras 42 & 43)

(2) The 'dispute' referred to in s. 74 of the MACA refers to dispute arising between two or more providers of aviation services. The defendant obviously mounted the wrong dispute against the wrong party. Whatever issue or dispute the defendant had regarding the imposition of the increased PSC rate was instead the defendant's dispute against the MAVCOM and not at all the plaintiff. The plaintiff was merely enforcing what was statutorily provided. Even the plaintiff was devoid of any authority to go against the statutory grain. The defendant's actual dispute was not a dispute between two aviation service providers but instead a dispute against the statutory decision of a statutory body exercising a statutory duty by the MAVCOM. The dispute resolution mechanism under s. 74 of the MACA remained verily irrelevant to the plaintiff's claim in the present suit. (paras 47 & 50)

(3) The defendant should have mounted a challenge against the statutory decision laid down by the MAVCOM and not vex the plaintiff who was merely enforcing what was statutorily incumbent upon the plaintiff to claim. Furthermore, the defendant should have moved for a judicial review against the MAVCOM's statutory decision years ago when the increased PSC rate was coined to be applicable. Even though the defendant did file an application to seek leave to initiate judicial review proceedings against the MAVCOM, the said application was only filed five months after the plaintiff commenced the present action. Be that as it may, the said judicial review application was dismissed at the leave stage. It was sufficient to dismiss the defendant's case *in limine*. (paras 48, 49 & 51)

(4) The defendant failed to raise any triable issue. The plaintiff's application in encl. 6 was allowed with costs. Since encl. 6 of this suit was allowed, as mutually agreed by both parties that the decision of encl. 6 of the present suit would bind the other two suits, summary judgment was also ordered in the other suits. (paras 102 & 103)

Case(s) referred to:

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank and Malaysia French Bank Bhd) v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunication Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Ho Lai Ying & Anor v. Cempaka Finance Bhd [2004] 1 CLJ 232 CA ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(refd)***

Legislation referred to:
Civil Aviation Act 1969, s. 24A
Malaysian Aviation Commission Act 2015, ss. 46, 74, 75, 76, 77, 78, 98(1), 100
Malaysian Aviation Commission (Aviation Services Charges) Regulations 2016, s. 6(1)(a), Second Schedule
Rules of Court 2012, O. 14 r. 1
Rules of the High Court 1980, O. 14

For the plaintiff - Shannon Rajan & Eric Gabriel Gomez; M/s Skrine
For the defendant - Lim Tuck Sun, Kenneth Koh & Ariel On; M/s Chooi & Company + Cheang & Ariff

Reported by Najib Tamby

JUDGMENT

Azimah Omar J:

Introduction

[1] The parties in the present suit are providers of aviation services in Malaysia namely; Malaysia Airports (Sepang) Sdn Bhd and AirAsia X Berhad.

[2] *Vide* its statement of claim, the plaintiff (Malaysia Airports (Sepang) Sdn Bhd) has initiated the present action against the defendant (AirAsia X Berhad) to recover the outstanding passenger passengers service charges ("PSC") allegedly owed by the defendant to the plaintiff.

[3] Concurrent with this civil suit, the plaintiff has also commenced two other civil suits against the defendant namely; Civil Suit No: WA-22NCVC-816-12/2018 and WA-22NCVC-58-01/2019.

(All the three suits hereinafter will be referred as "the three suits")

[4] By and large, the plaintiff's claims in the three suits all pertain to the issue of payment of the PSC payable to the plaintiff for providing aviation and passenger related facilities, infrastructure, and services to the defendant (primary business of which being providing air transport services).

[5] In the three suits, the plaintiff primarily seeks for an order to declare that the defendant is required to pay the plaintiff, the PSC at the new PSC rate pursuant to the present aviation services charges, regulations and/or conditions of use for Kuala Lumpur International Airport Malaysia (COU) 2017.

[6] Consequential to the said declaratory decree, the plaintiff also sought for payments of the outstanding PSC from the defendant for the period from 22 August 2018 to 28 December 2018.

[7] In each of these suits, the plaintiff has also filed separate notices of application pursuant to O. 14 r. 1 Rules of Court 2012 (ROC 2012) to enter summary judgment against the defendant for the following sums:

(i) Suit No: WA-22NCVC-816-12/2018 (encl 5):

RM9,395,856.50 - PSC invoices for the period of 15 August 2018 to 21 October 2018;

(ii) Suit No: WA-22NCVC-817-12/2018 (encl. 6):

RM26,718,142 - PSC invoices for the period of 1 July 2018 to 21 October 2018;

(iii) Suit No: WA-22NCVC-58-12/2018 (encl. 5):

RM4,614,329 - PSC invoices for the period of 21 November 2018 to 28 December 2018.

[8] The cumulative outstanding PSC sum claimed by the plaintiff in all of the three suits is RM40,728,327.50. The plaintiff also claims for late payment interest at the rate of 12% per annum on the same amount.

[9] It is not in dispute that the three suits by the plaintiff are *vis a vis* or regarding the same subject matter and are also based on the same factual matrix. Hence, the issues raised in the three suits are common and similar issues. That being the case, the parties have agreed before this court that any decision on any one of the applications will bind the other two applications for summary judgment.

[10] In view of this mutual agreement, this court then proceeded to hear encl. 6 in Suit No: WA-22NCVC-817-12/2018.

Background Facts

[11] The background facts pleaded by the plaintiff in its statement of claim are *inter alia* as follows:

(i) The plaintiff manages, operates, maintains and provides aviation and passenger related services at Kuala Lumpur International Airport ("KLIA") which includes the Kuala Lumpur International Airport 2 terminal ("klia2").

(ii) The defendant is a provider of air transport services. At all material times, the defendant is a user of the aviation-related services made available by the plaintiff at KLIA and klia2. At all material times, the passengers of the defendants are users of the passenger-related services provided by the plaintiff at KLIA and klia2 (collectively "the airports").

The License

(iii) Pursuant to s. 24A of the Civil Aviation Act 1969 ("CAA"), the Minister of Transport granted the plaintiff a license to manage, operate, maintain and develop the airports for a period commencing from 12 February 2009 to 11 February 2034 ("the license").

(iv) Furthermore, pursuant to s. 100 of the Malaysian Aviation Commission Act 2015 ("MAVCOM Act"), the licence issued under the CAA shall continue to be authorised under the MAVCOM Act.

(v) In 2010 and pursuant to the license, the plaintiff and the defendant ("the parties") have entered into a contract known as "conditions of use for Kuala Lumpur International Airport Malaysia (copy revised as at 1 September 2010)" to *inter alia* govern the defendant's use of KLIA ("COU 2010").

(vi) At all material times, the plaintiff has specifically referred to and relied upon the provisions of the COU 2010 and the defendant did not challenge the applicability of the same.

(vii) Thereafter in 2017, pursuant to art. 1(c) of the COU 2010, the plaintiff has invited all the airlines including the defendant to a consultation regarding the proposed amendments to the terms and conditions of the COU 2010 ("the meeting"), which are contained in the "Conditions of Use For Kuala Lumpur International Airport (commencement date: 1 February 2017)" ("COU 2017").

(viii) The plaintiff further informed the relevant parties attending the meeting that a copy of the COU 2017 could be obtained from its website, where it remains readily available to this date.

(ix) The defendant had no objections and accepted the terms and conditions of the COU 2017 by continuing to use KLIA and the airport services and facilities therein even after receiving notification about the amendments.

(x) The terms of COU 2017 *inter alia* are:

(i) Article 1(b), Commencement Date: "These Conditions of Use shall come into force and be deemed binding on you with effect from the Commencement Date and supersede all previous conditions of use. Despite the fact that you may not sign these Conditions of Use and despite anything set out in Article 1(c), if you use the Airport Services and Facilities on or after the Commencement Date, you will be bound by these Conditions of Use."

(ii) Article 1 (c), Notification: "We will take reasonable steps to notify you of these Conditions of Use before the Commencement Date. However, if you use the Airport Services and Facilities without being notified of these Conditions of Use, the onus is on you to

view them at our Website as soon as practicable following your first use of the Airport Services and Facilities after the Commencement Date."

(iii) Article 1 (d), Amendments of Conditions of Use: "We may amend any of these Conditions of Use, after consultation with you through airline operator committee (where necessary) at any time and from time to time. The obligation for consultation as hereinabove stated shall not apply if the amendments is required due change in CAA, MAVCOM Act, the Regulations and any applicable legislation, laws and regulations. We will take reasonable steps to notify you of the amendments. However, the onus is on you to check our Website at regular intervals to see if these Conditions of Use have been amended. If you continue to use the KLIA and the Airport Services and Facilities and/or continue to perform the ground handling services after we have notified you of the amendments, you are deemed to have accepted the said amendments."

(iv) Article 3(a), Airport Charges Payable: "You are required to pay to us the charges contained in Schedule 3 including the passenger service charges and security charges stated therein and such other charges that may be notified to you by us from time to time for the use of the KLIA and the Airport Services and Facilities (collectively " Airport Charges")."

(v) Article 3(d), Invoices: "Invoices will be issued every month (or at such other time interval as we may specify) and you are required to pay to us the Airport Charges stated in the invoices by the due date(s) stipulated therein, failing which late payment charges at the rate stipulated herein shall be payable by you to us."

(vi) Article 3(e), Statement of Accounts: "We will render to you statement of accounts every month (or at such other time interval as we may specify) containing a summary of the Airport Charges that are due and owing to us."

(vii) Article 3 (f), Statements of Accounts/Invoices Conclusive Evidence: "it is your duty to notify us in writing (together with the relevant particulars) of any error or discrepancy in the statement of accounts and/ or invoice, whether in regard to the airport charges stated therein and/or the types of airport services and facilities performed, within thirty (30) calendar days from the date of the statement of accounts and/or invoice. Should you fail to notify us within the aforesaid period of thirty (30) calendar days, the airport charges and the types of airport services and facilities performed stated in the statement of accounts and/or invoice shall be deemed final and conclusive evidence of the airport charges due from you to us and/ or the airport services and facilities performed."

(viii) Article 3(g), Revision in Airport Charges: "We may amend or vary the Airport Charges, after consultation with you of such amendments through airline operator committee (where necessary), at any time and from time to time and we will notify you of the

changes to the Airport Charges in accordance with the notice provisions herein. For the avoidance of doubt, the obligation for consultation as hereinabove stated, shall not apply to Airport Charges which are prescribed and/or regulated by the CAA, MAVCOM Act, the Regulations and any applicable legislation, laws and regulations. For the avoidance of any doubt we are entitled to pass to you any new costs which are imposed on us, such as those imposed under or by legislation, administrative direction or authority, taxation or similar costs."

(ix) Article 3(h), Time of Payment: "Unless both of us have agreed otherwise in writing, you must pay us the Airport Charges:

- not later than the due date(s) stated in the invoices, or
- in the case of one off or occasional provision of Airport Services and Facilities, prior to your aircraft leaving the KLIA."

(x) Article 3(j)(i), Suspension of Use: "Should you fail to pay the Airport Charges within thirty (30) days from the date of the invoices or as per Article 3(d) ("Outstanding Airport Charges"), we may:

- suspend your use of the Airport Facilities and Services or if in the case of a ground handler, suspend your provision of the ground handling services; and/or
- recover the Outstanding Airport Charges and late payment charges thereon by forfeiting the Security Deposit or exercising our rights under any bank guarantee provided in accordance with Article 3(I) herein; and/or
- require you to pay the future Airport Charges in advance before your aircraft departs from the KLIA; and/or
- take any action(s) against you in accordance with the law to recover the Outstanding Airport Charges and late payment charges thereon from you.

(xi) Article 3 (k), Late Payment Charges: "In addition to Article 3(j), if you do not pay the Airport Charges when due, we are entitled to charge you late payment charges at the rate of 12% per annum on the Outstanding Airport Charges calculated on monthly basis from the date upon which the Airport Charges were due and payable until the date of payment of the Airport Charges (both dates inclusive, as well after as before judgment). Such late payment charges shall be a charge payable in addition to Airport Charge payable."

(xii) Article 4(a), Compliance with Conditions of Use: "You must comply with these Conditions of Use and without limiting the generality of the foregoing, pay the Airport Charges to us by the due date(s) stipulated in the invoices."

(xiii) Article 4(c), Compliance with Applicable legislations: "You must comply with the provisions of the CAA, MAVCOM Act, the Aviation Offences Act 1984 and the Regulations from time to time in force in Malaysia and all applicable legislations, laws and regulations, including but not limited to environmental laws or regulations, noise management procedures or regulations and/or occupational health and safety laws or regulations. You must not do anything which puts us in breach of any of the aforesaid legislations."

(xiv) Note under Schedule 3: "The Airport Charges marked (**) in Schedule 3 are subject to the Malaysian Aviation Commission (Aviation Services Charges) Regulations 2016 ("MAVCOM (Aviation Charges) Regulations"). In the event there is any amendment made to MAVCOM (Aviation Charges) Regulations in respect of the Airport Charges, the revised or new charges will be payable to us from the date such amendment come into force (irrespective whether these Conditions have been amended or otherwise to reflect such changes.

The Relevant Statutory Provisions Governing The Airport Charges

(xi) Under s. 46 of the MAVCOM Act, the Malaysian Aviation Commission ("the Commission") is vested with the power to regulate charges for aviation services, which also includes the PSC.

(xii) Section 98(1) of the MAVCOM Act stipulates that the Commission is also vested with the power to make regulations as may be necessary or expedient, *inter alia*, to carry out or achieve the objects and purposes of the MAVCOM Act.

(xiii) With the powers vested under ss. 46 and 98(1) of the MAVCOM Act, the Commission in 2016 had drafted the Malaysian Aviation Commission (Aviation Services Charges) Regulations 2016 [P.U.(A)100/2016] ("ASC Regulations") which later came into force on 15 April 2016.

(xiv) Regulation 6(1)(a) of the ASC Regulation provides, among others, that the PSC (in respect of any person boarding an aircraft carrying passengers for hire or reward) shall be as specified in the Second Schedule of the ASC Regulation.

(xv) Since the commencement of the ASC Regulations, the Commission has twice amended the Second Schedule. A summary of the regulatory revisions to the PSC for the non-ASEAN international destinations from klia2 is set out below:

PSC for Non-ASEAN International Destinations from klia2	
Regulation	PSC (RM)
ASC Regulation	32.00
Amended ASC Regulation	44.00
Present ASC Regulation	67.00

(xvi) Pursuant to cl. 3(a) of the COU 2017 read together with the note under Schedule 3 of the COU 2017, the new PSC rate stipulated in the present ASC Regulations becomes payable by the defendant to the plaintiff from the date of such amendment came into force.

(xvii) By a letter dated 29 December 2017, Malaysia Airports Holding Berhad ("MAHB"), on behalf of the plaintiff, had informed all relevant airlines including the defendant of the present ASC Regulations and that the new PSC rate for non-ASEAN international destinations from klia2 would be applicable for all tickets issued from 1 February 2018.

(xviii) However, subsequent to the letter dated 29 December 2017, MAHB had issued a letter to all relevant airlines including the defendant that the new prescribed rate is temporarily dispensed with until further notice.

(xix) About six months later, by a letter dated 8 June 2018 MAHB had informed/notified the defendant that the temporary dispensation would cease and that, the new (present) ASC Regulations and the new PSC would be applicable for all tickets issued from 1 July 2018 onwards.

(xx) In the same letter (dated 8 June 2018), MAHB had also specified and notified that for all tickets purchased prior to 1 July 2018 for travel on or after 1 July 2018, the defendant should provide relevant data and make a written declaration for the application of the former PSC rate, failing which the new PSC rate would be applied to these tickets as well.

(xxi) Despite the said notification, the defendant did not respond to this letter nor did it provide relevant data or a written declaration.

[12] Following the imposition of the new prescribed rate, the plaintiff subsequently issued to the defendant PSC invoices for the period between 1 July 2018 to 21 October 2018 based on the new PSC rate.

[13] However, despite paying the plaintiff based on the PSC invoices issued against them, the defendant had continued to pay the plaintiff in accordance to the old or prior PSC rate.

[14] Therefore, there remains an outstanding PSC sum of RM26,718,142 remained unpaid by the defendant being the difference between the PSC sum calculated based on the new and the old PSC rate.

[15] It is this alleged failure to fully pay the proper PSC sum that has pushed the plaintiff to initiate the present suit against the defendant.

The Defendant's Defence

[16] In its statement of defence, the defendant primarily disputes the imposition of the increased PSC rate on the principal ground that the plaintiff's action is misconceived, invalid and/or premature as the plaintiff has not complied with/or availed itself of the statutory provisions for dispute resolutions within the Mavcom Act.

[17] According to the defendant, since there exist disputes regarding the imposition of the new PSC rate, such dispute must therefore be dealt with according to the procedures provided under the Mavcom Act. It was further contended by the defendant that under the Mavcom Act, such disputes are to be mediated, and should the mediation be unsuccessful, the disputes must then be referred to the Mavcom. Any decision made by the Mavcom on the dispute is subject to appeal to the High Court. Thereto, the defendant contends that until and unless such procedures are complied with, or exhausted by the plaintiff, this court would have no jurisdiction to determine the plaintiff's suit.

[18] The defendant has also pleaded the following defences:

(i) The defendant has never accepted the terms of the COU 2010 and COU 2017. And therefore the defendant is not bound by the terms stated in the COU 2010 and COU 2017;

(ii) The plaintiff had represented to the defendant that the PSC rate stated in the present ASC Regulations was a ceiling rate and not a fixed rate, therefore the amount payable to the plaintiff was to be negotiated between the parties;

(iii) The plaintiff is not entitled to impose the new increased PSC rate as it had not performed its obligations satisfactorily; and

(iv) The defendant has a claim which it is entitled to set-off against the plaintiff's claim.

The Plaintiff's Application For Summary Judgment In Enclosure 6

[19] The plaintiff's application for summary judgment is supported by the following affidavits:

(i) Affidavit in support affirmed by Zuraini binti Zahari (the plaintiff's senior manager of the finance division) on 3 January 2019 (encl. 5).

(ii) Affidavit in reply affirmed by Veelayudan a/l Krishnan Nair (the plaintiff's general manager of research and planning) on 21 February 2019 (encl. 12).

[20] In support of the plaintiff's O. 14 application, counsel for the plaintiff has submitted that the plaintiff's suit is a plain and straightforward claim by a service provider for usage of services rendered to an airline company, namely, to collect charges which have been prescribed by the law. It was further contended that the present ASC Regulations stipulates (with utmost clarity and without ambiguity) that the new PSC rate prescribed is fixed rate and never a ceiling rate.

[21] In essence, the plaintiff's counsel submitted that the issues raised by the defendant in its statement of defence do not amount to a triable issue and do not merit a full-blown trial. Thus, a summary judgment ought to be granted for the plaintiff's benefit on the claimed amount.

The Issues Raised By The Defendant

[22] In opposing the plaintiff's application, the defendant contended that they have raised triable issues and therefore the plaintiff is not entitled to the O. 14 summary judgment that it has sought for.

[23] In support of its contention, the defendant's counsel has submitted the following arguments:

(i) The claim by the plaintiff for payment of increased PSC rate is a matter of dispute that is subject to mediation and dispute resolution under the purview of the MAVCOM particularly under ss. 74 to 78 of the MAVCOM Act.

(i) It was submitted by counsel for the defendant that the filing of the present suit by the plaintiff (in claiming the outstanding debt from the defendant arising from the new increased PSC rate not paid by the defendant) is in clear breach of the procedural provisions stipulated in the Mavcom Act.

(ii) The defendant contended that the plaintiff is not entitled to unilaterally impose the new increased PSC rate on the defendant. The defendant argues that the present ASC Regulations rate remains a subject of dispute as the defendant takes the stance that the new increased PSC rate is merely a ceiling rate (not a fixed rate) and remains to be negotiable.

(iii) The ceiling rate contended by the defendant is premised on the following arguments (ceiling rate arguments):

(a) The ASC Regulations and the amended ASC Regulations have listed out the categories of PSC rates by destination. Nonetheless, the PSC rate remains constant across all domestic airports;

(b) The defendant argues that the present PSC rates were meant to be ceiling rates and not fixed rates, which then would allow operators of airline services to negotiate the applicable rates for each airport, including klia2 in this instance.

(c) The plaintiff had represented to the defendant that the new PSC rate was a ceiling rate and therefore distinctions would still be made between various domestic airports.

(d) This is subject to negotiations under the framework of the applicable legislation and also subject to the consideration that klia2 was to operate as a low cost terminal as opposed to KLIA.

(e) The plaintiff had recognised from the beginning that the PSC rate would apply differently between different domestic airports and/or terminals. Such recognition was further strengthened when the plaintiff had initially waived the imposition of the new PSC rate and continued imposing the old PSC rate until the end of 2017, whilst parties are engaged into a series of negotiations regarding the revised PSC rate. But nevertheless, the plaintiff has now uniformly imposed the new PSC rate across all airports in Malaysia starting from July 2018.

(f) The dispute on the imposition of the new PSC rate is clearly reflected in the correspondences between the plaintiff and the defendant as well as AirAsia Berhad, being its sister company. The defendant had expressed its disagreement with the imposition of the new PSC rate through these exchanges in correspondence.

[24] On the abovementioned ceiling rate arguments, it was argued by the defendant that a dispute has arisen between the parties on whether the new PSC rate is a ceiling rate or a fixed rate. Thus, the defendant argues that this is a matter that should be resolved under the MAVCOM Act, particularly ss. 74 to 78 of the MAVCOM Act. Adherence of which would compel the parties to attempt mediation, and in case mediation fails, parties must then resort to seek a resolution by the MAVCOM.

[25] The defendant argues that, the plaintiff had opted to circumvent the MACVOM Act in bringing this action against the defendant despite having full knowledge of the applicable dispute resolution mechanism as prescribed under the MAVCOM Act.

(ii) The defendant had neither accepted the COU 2010 nor the COU 2017

[26] It was the defendant's contention that they had never agreed to the MAHB's COU 2010. The defendant contends that the defendant's non-acceptance and objections against the terms of the COU has been conveyed to the plaintiff. It is further alleged that the parties had commenced several negotiations regarding the terms of the COU 2010 but the parties have yet to reach a final consensus. On the extreme contrary, the plaintiff remains insistent on the adherence of the terms of the COU 2010.

[27] In respect of COU 2017, the defendant similarly argued that they disagreed with the terms unilaterally set out in the COU 2017 on the basis that the terms in the COU 2017 are unfair against the defendant. The defendant expressed its sentiment that the terms of the COU 2017 are motivated by the monopolistic behaviour of the plaintiff and the imposition of the new PSC rates is not at all justifiable.

(iii) The alleged unsatisfactory services rendered by the plaintiff and set-off

[28] It was contended by the defendant that the plaintiff is not entitled to the increased PSC rate as the plaintiff had not satisfactorily fulfilled its obligations. The defendant had summarised the plaintiff's failures in performing its obligations as follows:

(i) Rupture of a fuel line which disrupted the operations of Pier P at klia2;

(ii) Unplanned closures on runway 3 at klia2 on 6 January 2018, 13 January 2018, 9 March 2018, 27 March 2018 and from 11 May 2018 to 7 June 2018. The same resulted losses against the defendant in the form of aircraft towage, additional fuel costs, delay, manpower involved, flight cancellation. Consequence of which the defendant allegedly suffered in loss of revenue and taxing cost;

(iii) The matter above was repeatedly communicated to the plaintiff and yet the plaintiff failed to address the same;

(iv) There is a disparity in the provision of services and maintenance of the infrastructure between KLIA and klia2;

(v) The new PSC rate can neither be uniformly imposed across KLIA and klia2, nor across all airports in Malaysia; and

(vi) Specifically, the plaintiff has not maintained klia2 to the standards of KLIA, in particular, in the aspect of hygiene standards.

The General Principles Of Law Relating Summary Judgment Under Order 14 Of The ROC 2012

[29] A summary judgment procedure allows a plaintiff to obtain judgment without the need for a full-blown trial when the plaintiff's case is overtly strong against the defendant and that the defendant has no meritable defence against the plaintiff's compelling and irrefutable claim.

[30] The principle of law regarding the court's discretionary power in granting summary judgment under O. 14 of the ROC 2012 is trite and has been well-established. There is already a plethora of cases decided by the appellate courts in relation to the applicable principles of law in granting summary judgments under O. 14 of the ROC 2012 (formerly the Rules of the High Court 1980).

[31] Suffice for this court to mention a few. The Federal Court in the case of *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300 has clearly set out the requisite elements that an applicant ought to satisfy in an application for summary judgment under O. 14 of the Rules of the High Court 1980 (now the ROC). The Federal Court has held as follows:

> For the purposes of an application under Order 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14
>
> *... if however these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.*
>
> (emphasis added)

[32] The Court of Appeal in the case of *Ho Lai Ying & Anor v. Cempaka Finance Bhd* [2004] 1 CLJ 232 had similarly stated the following:

> [8] Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff without trial when there is no dispute as to fact or law. In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, the learned judge observed:
>
> > The effect of O. 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there are no *bona fide* triable issues.
>
> [9] In *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, the learned judge said (at pp. 86-87):
>
> > ... the purposes of O. 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.
>
> [10] Thus, a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly which to us would mean the plaintiff has to establish the existence of certain facts and must prove that

A those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

[33] Ramly Ali J (as he then was) in the case of *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank and Malaysia French Bank Bhd)* B *v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723 (while referring to the celebrated decision of the Supreme Court in the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400) has digested the applicable principles in an application for summary judgment as follows:

C The law of summary judgment under O. 14 of the RHC is settled. The principle to be applied has been laid down in so many authorities. In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400, the Supreme Court has laid down comprehensive principles to be adopted in cases involving application for summary judgment under O. 14. The relevant principles are as follows:

D

(i) In an application under O. 14, court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

E

(ii) Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently in probable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

F

(iii) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because the question of law is a first blush of some complexity and therefore takes a little longer to understand.

G

H (See also: *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303; [2008] 1 MLJ 585, Court of Appeal; *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, Supreme Court)

Analysis And The Court's Decision

I **[34]** This court must not lose sight of the fact that the core issue of the present application is inherently simple, although muddled with lengthy narratives and facts which to an extent makes the case seem unnecessarily more complex than what it really is.

[35] The central issue to be determined here is whether there is actually a dispute between the plaintiff and the defendant regarding the imposition of the new increased PSC rate. If there is indeed a dispute, then next issue to be determined is whether the dispute is a matter which falls within the purview of Mavcom Act, ie, to be resolved by the dispute resolution mechanism as prescribed under the Mavcom Act. If that shall be the case, then this court would not have necessary jurisdiction to adjudicate the plaintiff's claim.

[36] The defendant (in disputing its liability to pay the plaintiff based on the new PSC rate) had challenged the increased PSC rate by raising the three issues which had been stated earlier in this judgment.

Whether The 'Dispute' Claimed By The Defendant Is A Dispute Between Two Aviation Service Providers Or Instead A Challenge Against A Statutory Body's Decision While Exercising Its Statutory Duty Or Discretion

[37] The defendant had contended that the new PSC rate is not a fixed rate and it is merely ceiling rate which is subject to negotiations. The defendant thus argues that the issue of whether the new PSC rate is a ceiling rate or a fixed rate and according to the defendant, this is a dispute which ought to be determined *via* the dispute resolution mechanism under the Mavcom Act and not by this court.

[38] Nonetheless, even before this court can even indulge in a deliberation to determine the existence of a dispute, this court must be minded not to overstep its boundaries and to unwittingly usurp or encroach upon the statutory authority of a statutory body as vested under a statute. Thus, the first hurdle to be overcome here is not the question whether or not there exists a dispute or even whether such dispute ought to fall within the ambit of matters ought to be resolved *vide* the dispute resolution mechanism under the Mavcom Act. Instead, the first hurdle is to fully understand and ascertain the true nature of the 'dispute' regarding the prevailing PSC rate and to ascertain whether such a dispute is a dispute between two aviation service providers or a dispute against the statutory decision of a statutory body. Thus, for this court to examine and determine the true nature of this 'dispute' it is imperative that this court appreciates the many concepts and legal provisions that underline the aviation service industry (particularly regarding the PSC).

[39] Succinctly speaking, this court must determine whether or not the 'dispute' claimed by the defendant is a dispute between two or more aviation services providers (which falls within the ambit of s. 74 of the Mavcom Act) or instead a dispute against a statutory decision by the statutory body, the Commission (which falls outside the ambit of the same section). It is immensely pertinent that it is understood in clarity, that the Commission is not a provider of aviation services. The Commission is instead the governing statutory body overseeing and regulating the aviation service industry.

[40] Now, what in actuality is PSC? PSC is essentially a charge levied on departing passengers at airports. The PSC remains to be one of the most crucial sources of income for the plaintiff to cover the operating and capital expenditure on the airports which are under the plaintiff's management and maintenance.

[41] How is PSC actually imposed on passengers? The passengers are basically end users of air transportation services rendered by the defendant. Nonetheless, the defendant's service of supplying air transportation also utilises the infrastructure and services of passenger-related services which are provided by the plaintiff. Thus, since the passengers (as end users) also benefited from the services rendered by the plaintiff, the defendant is obliged to collect the PSC from its passengers and pay the same to the plaintiff. This arrangement thus far remains undisputed.

[42] Who or which body determines the prevailing PSC rate? The PSC rate is determined by the Malaysian Aviation Commission ("the Commission"). It must be kept clear and with clarity, that the body who determines the prevailing PSC rate is a statutory body (being the Commission). And this statutory body is exercising its statutory authority and duty as prescribed under a statute (being the Mavcom Act). The plaintiff has had no hand at all in the determination of the prevailing PSC rate.

[43] Pursuant to s. 46 of the Mavcom Act, the commission is vested with the power to regulate the charges for aviation services, which specifically includes the prevailing PSC.

[44] Section 46 of the Mavcom Act reads as follows:

> Power to set charges
>
> 46. (1) The Commission shall regulate charges for aviation services.
>
> (2) In carrying out its function under subsection (1), the commission shall have the power to:
>
> (a) set charges, including maximum charges, or establishing the method for determination of such charges for aviation services;
>
> (b) carry out reviews of passenger services charges, landing fees and parking fees, third party ground handling charges and other charges for aviation services at such intervals as the Commission thinks fit; and
>
> (c) following such reviews, revise and charges set or method established under paragraph (a) as the Commission thinks fit.

[45] By the wording of s. 46, this court agrees with counsel for the plaintiff that s. 46 clearly grants the Commission exclusive statutory authority to regulate charges for aviation services which include the PSC.

[46] It is opportune at this juncture to actually examine s. 74 of the Mavcom Act that the defendant so dearly relied upon. The section aptly reads the following:

> 74. (1) Any dispute **between two or more providers of aviation services** regarding any matter under this Act shall first be resolved through mediation (emphasis added).

[47] It is resoundingly clear from the excerpt above that the 'dispute' referred to in s. 74 refers to dispute arising between two or more providers of aviation services. Now, in the extreme contrary, the defendant has obviously mounted the wrong dispute against the wrong party. In actuality, whatever issue or dispute the defendant had regarding the imposition of the increased PSC rate is instead the defendant's dispute against the Commission and not at all the plaintiff. The plaintiff is merely enforcing what is statutorily provided. Even the plaintiff is devoid of any authority to go against the statutory grain.

[48] If indeed the defendant genuinely disputes the imposition of the increased PSC rate, then the defendant should have mounted a challenge against the statutory decision laid down by the Commission and not vex the plaintiff who is merely enforcing what is statutorily incumbent upon the plaintiff to claim. The rate is set by the Commission and not the plaintiff. The defendant in actuality is at odds with the Commission's statutory decision and not at all the plaintiff's claim. This court cannot stand with the defendant's attempt to bend the law to suit its narrative. Instead of faulting the plaintiff for allegedly failing to adhere to the Mavcom Act's dispute resolution mechanism, the defendant should have accordingly moved its own initiative to challenge the Commission's decision. This court is in full agreement with the plaintiff's counsel that the defendant should have moved for a judicial review against the Commission's statutory decision years ago when the increased PSC rate was coined to be applicable. But even years afterwards, this is exactly what the defendant has failed or outright refused to do. Instead of properly mounting a challenge against the Commission's decision, the defendant now unnecessarily and unjustly vex the plaintiff with the exact same issue the defendant should have raised in a judicial review against the Commission. This court shall not stand to allow such afterthought to be contended by the defendant.

[49] Nevertheless, this court needs to mention here that the defendant had filed an application to seek leave to initiate judicial review proceeding against the Commission. However, it must be noted that the said application for leave was only filed on 14 May 2019, five months after the plaintiff commenced this present action against the defendant. Be that as it may, the said judicial review application was dismissed by the High Court at leave stage on 25 June 2019.

[50] Thus, is the defendant's challenge against the increased PSC rate a dispute falling within the ambit of s. 74 of the Mavcom Act? This court hesitates nothing to answer that question in the negative. Without an iota of doubt, the defendant's actual dispute is not a dispute between two aviation service providers but instead a dispute against the statutory decision of a statutory body exercising a statutory duty by the Commission. Thus, the dispute resolution mechanism under s. 74 of the Mavcom remains verily irrelevant to the plaintiff's claim in the present suit.

[51] With all of the above in mind, it is actually sufficient for this court to dismiss the defendant's case *in limine*. Nonetheless, for the sake of completeness and to further solidify this court's findings, this court shall remain to delve into the other contentions raised by all parties.

Whether The Defendant's Contention That The PSC Rate Is A Negotiable Ceiling Rate A Genuine Contention Or Mere Afterthought

[52] Now, after determining that the defendant ought not to be allowed to abuse the present proceeding as a backdoor judicial review against the Commission's statutory decisions, this court shall (for the sake of completeness) delve into the defendant's backdoor contention against the new PSC rate as set by the Commission. Thus, even if this court were to be in error of its earlier determination (on the irrelevance of the dispute resolution mechanism under the Mavcom Act) this court shall still render its analysis and findings regarding the defendant's contention here.

[53] By and large, the defendant contends that the core dispute here is whether the new PSC rate is a uniform fixed rate or instead a negotiable ceiling rate to be agreed upon.

[54] The defendant also contended that the plaintiff has represented that the new PSC rate is a ceiling rate. Now, this court does not hesitate to find that this contention does not hold water. As this court has found earlier, even the plaintiff in and of itself has no authority to represent or to negotiate the statutory PSC rate set by the Commission. The right and proper party to be referred to regarding the PSC rate is not the airline service providers subject to the statutory rate but instead the statutory body determining the statutory rate. Whether or not the plaintiff has represented the new PSC rate in any manner whatsoever remains irrelevant and the defendant should have known better to place reliance on the representation of any entity other than the Commission itself. Again, if indeed the defendant is genuine in its pursuit to clarify the nature of the new PSC rate, the defendant should have sought for clarification from the Commission years ago and not simply latch onto a misplaced reliance with the plaintiff's representation (if any). Thus, in view of the defendant's misplaced reliance, and for the sake of brevity, there is no necessity to go at extreme lengths to deliberate on this misplaced reliance on an irrelevant representation.

[55] With such power vested unto the Commission, the Commission had then produced the Malaysian Aviation Commission (Aviation Services Charges) Regulations 2016 (ASC Regulations) which came into operation on 15 April 2016.

[56] Now, reg. 6(1)(a) of the ASC Regulations clearly spells out the provision pertaining passenger-service charges and security charges. With regards to passenger-service charges, reg. 6(1)(a) states that the PSC rate in respect of any person boarding an aircraft carrying passengers for hire or reward shall be specified in the Second Schedule of the ASC Regulations.

[57] Regulation 6(1)(a) of the ASC Regulations initially prescribed that the PSC for international destinations departing from klia 2 was RM32.

[58] Subsequently, on 1 January 2017 the Commission then produced the amended ASC Regulations which amended the Second Schedule. In particular, the PSC for non-ASEAN international destinations departing from klia 2 was raised from RM32 to RM44 (the latter is defined as "former PSC rate").

Passenger Service Charges

(1) No.	(2) From	(3) To	(4) Rate (RM)
1.	All domestic airports	All domestic destinations	8
2.	All domestic airports	All destinations in Association of South-East Asian Nations Member State	29
3.	All domestic airports except Kuala Lumpur International Airport 2	All international destinations except for destinations in Association of South-East Asian Nations Member State	67
4.	Kuala Lumpur International Airport 2	All international destinations except for destinations in Association of South-East Asian Nations Member State	44

[59] Subsequent to the amended ASC, the Commission yet again amended the PSC rate to standardise the PSC rate for departures from all domestic airports to any non-ASEAN destinations across the board by revising the PSC rate from RM44 to RM67 (the new increased PSC rate) by producing the present ASC.

Passenger Service Charges

(1) No.	(2) From	(3) To	(4) Rate (RM)
1.	All domestic airports	All domestic destinations	8.00
2.	All domestic airports	All destinations in Association of Southeast Asian Nations member State	29.00
3.	All domestic airports	All international destinations except destinations within the Association of Southeast Asian Nations member State	67.00

[60] It is immensely clear as specified under the Second Schedule of the present ASC that the PSC rate for departures from all domestic airports to all international destinations (except destinations within the ASEAN member states) is set at RM67. This court fully agrees with the plaintiff's counsel that there is nothing whatsoever in the Second Schedule to suggest or imply that RM67 is a ceiling rate.

[61] There is no necessity at all for this court to examine beyond the clear, precise, plain and ordinary meaning of the words of the present ASC. This court has no difficulty in concluding that rate stipulated in the Second Schedule of present ASC is a fixed rate. If indeed the Commission has intended of such allowance to negotiate a 'ceiling rate' then the Commission would have included such allowance.

[62] This court is of the considered view that if indeed the Regulation had intended that the rate specified to be a ceiling rate, then the Regulation would have worded the Second Schedule accordingly. But this is not at all the case in the present suit.

[63] Furthermore, this court cannot simply ignore the fact that prior to producing the present ASC Regulations, the Commission had published the PSC Consultation Paper 2017 which set out its rationale for its planned revision of the former PSC rate to the new PSC rate. Upon close examination of the said consultation paper, this court observed that there was no indication or implication whatsoever (express or even implied) that the new PSC rate was intended to be a ceiling rate. Instead, the Commission constantly referred to its planned revision as an "increase" or "full equalisation". The relevant excerpts from the PSC Consultation Paper 2017 is reproduced below:

Subject to this consultation process, the Commission **Intends To Fully Equalise All PSC Tiers In Malaysia**, by increasing the long-haul PSC at klia2 from the current RM50 per departing passenger to **RM73 per departing passenger**, as first announced in October 2016. The **full equalisation**, once formally announced, is currently planned to take effect from 1 January 2018.

MAVCOM seeks feedback on the planned full equalisation of PSC in Malaysia, in particular on the planned increase in the long-haul PSC at klia 2 from the current RM50 per departing passenger to RM73 per departing passenger.

5.0 FEEDBACK

The Commission welcomes any feedback on its intention to **fully equalise the PSC in Malaysia** as elaborated in this Consultation Paper, in particular on the planned increase of the long-haul PSC at klia2 from the current RM50 per departing passenger to RM73 per departing passenger.

(emphasis added)

[64] This court observed that without an iota of doubt, it was explicitly reflected in the PSC Consultation Paper, that the new PSC rate was meant to be a fixed rate to equalise the rates between KLIA and klia2. If such rates were intended to be negotiable and variable to different airports, then there should not have been any mention of the word "equalised". Ultimately, the Commission adopted its proposals in the PSC Consultation Paper 2017 by producing the present ASC Regulations.

[65] Therefore, it remains irrefutable that the Commission's own publications had specifically intended that the new PSC rate to be a uniform fixed rate.

[66] Based on the abovementioned reasons, it is this court's judgment that the so-called "dispute" raised by the defendant on the contention of a negotiable ceiling rate is clearly an afterthought and is totally devoid of merits.

[67] This court also agrees with counsel for the plaintiff that if the defendant is unhappy with the new PSC rate or has any objection with regard to the new PSC rate, the defendant should have forwarded its objection when the Commission called for feedback or responses from industry players including the defendant in the PSC Consultation Paper. And this is exactly what the defendant has failed, refused, and neglected to do. The defendant was appropriately called to give feedback to the Commission's intention to equalise the PSC rate but opted to not issue any feedback at all. It is immensely telling from the defendant's absolute lack of feedback against the Commission's intention, that the defendant has no challenge at all against the equalisation of the PSC rate. It would be a grave injustice now for this court to allow the defendant to resile away from its representation and agreement to the revised fixed and uniform PSC rate.

[68] Alternatively, this court reiterates that if indeed the defendant is unhappy with the decision of the Commission (as the statutory body regulating the aviation services industry), the defendant should have commenced judicial review proceedings against the Commission to challenge and quash the Commission's decision to equalise the PSC rates for KLIA and klia2 within three months from the date of the coming into effect of the new PSC rate which was on 1 January 2018. However, the defendant did not apply for leave for judicial review or take the appropriate steps to challenge the Commission's imposition of the new PSC rate within the statutorily prescribed time but instead undertake to adopt this 'backdoor' review of the Commission's decision while abusing the due process of the plaintiff's claim. And this court can ascertain the underlying reason behind the defendant's vehement defence here. The reason being, due to the defendant's own indolence and silence, the defendant is already years out of time to file for a judicial review against the Commission's decision to impose the uniform new PSC rate.

[69] This court is minded of this backdoor attempt and reminds itself not to be manipulated as an instrument to assist the defendant's own indolence.

The Defendant Had Neither Accepted The COU 2010 Nor The COU 2017

[70] In disputing its obligation to pay the new PSC rate to the plaintiff under the terms and conditions contained in the COU 2010 and COU 2017, the defendant claims that it has neither accepted COU 2010 nor COU 2017. Therefore, it is not bound by terms and conditions of the COUs.

[71] Now, this court must not be clouded by mere rhetoric or narratives as though the imposition of the new PSC rate (as statutorily set by the Commission) is somehow dependent on the acceptance or non-acceptance of any of the COUs. This nexus and symbiosis to an extent is a fallacy. The mechanism of setting and imposing the new PSC rate is separate and independent of whatever that is agreed or disagreed between aviation service providers. The Commission's statutory decision to set the new PSC rate remains unperturbed and undisturbed by the bickering of two aviation service providers.

[72] The time window and statutory method to challenge the Commission's decision to impose the increased new PSC rate has already come and passed years ago. It must be stressed that neither the plaintiff nor the defendant can simply agree to opt out of the new PSC rate set by the Commission. Even if both the plaintiff and the defendant are in agreement to dispute the new PSC rate, such agreement can never override a statutory decision by the Commission. Instead, and as deliberated above, the proper remedy to vent such disagreement or dispute is to take proper measures to dispute the Commission's decision. That is to first, voice out feedback when asked by the Commission (which the defendant has failed) and to file for a judicial review against the decision within the statutorily stipulated time.

[73] Succinctly speaking, no aviation service provider or any number of aviation service providers can contract out of a statutory PSC rate set by the Commission. Any dispute against the rates imposed by the Commission must be vented out *vide* the proper legal channel, remedy, and procedure. Of which the defendant has absolutely undertook none.

[74] Furthermore, even if this court were to indulge the defendant of this misguided contention, it is obvious that the contemporaneous evidence regarding this 'disagreement' or 'non-acceptance' of the COUs does not at all support the defendant's case.

[75] Supposedly in support of the defendant's contention that it had never accepted the two COUs, the defendant placed utmost reliance on a letter dated 15 December 2010 (exh. "D-3", encl. 10) that it had issued to the plaintiff in response of COU contract sent by the plaintiff. The defendant had contended that in that letter, it had objected to terms of COU 2010 but the plaintiff remained to not take any heed to the objections raised.

[76] The defendant also contended that the plaintiff being in a dominant position, has unilaterally imposed onerous and unreasonable terms on the defendant *vide* the COUs.

[77] However, this court must emphasise here that, upon close perusal of exh. "D-3", the letter does not reflect any objection at all. It was simply a letter giving inputs into the COU contract as stated in the opening paragraph of the letter which reads as follows:

> Thank you for the above mentioned "Condition of Use" Contract sent earlier under cover of your letter reference 28th Sept 2010. Following are our inputs for your consideration.

[78] In respect of the COU 2010, it must be observed that the COU 2010 is a contract entered by the plaintiff (being granted the license by the Minister of Transport to manage, operate, maintain and develop airports) and the defendant (user of services and facilities made available) to govern the defendant's use of the plaintiff's airports.

[79] Clause 1 of the COU 2010 clearly sets out the framework of the conditions of use of the services and facilities provided by the plaintiff. Clause 1 reads as follows:

> 1. Conditions of Use
>
> (a) These Conditions of Use (including Schedules 1, 2 and 3 attached herewith) govern your (namely) airlines, aircraft operators and ground handlers) use of the KLIA. The types of Airport Services and Facilities are contained in Schedule 2 and their terms and conditions are more particularly set out therein. Where the context permits, "Conditions of Use" includes Schedules 1, 2 and 3.

A (b) These Conditions of Use (a copy of which is/has been served on you) shall come into force and be deemed binding on you with effect from the Commencement Date.

(c) We may amend any of these Conditions of Use, after consultation with you, including rules and directions at any time and from time
B to time. A copy of the amended Conditions of Use may be sent to you in accordance with Article 12 herein. If you continue to use the KLIA and the Airport Services and Facilities and/or continue to perform the ground handling services after we have notified you of the amendments, you are deemed to have accepted the said amendments.

C (d) We draw your attention to clauses in these Conditions of Use which exclude our liability in certain circumstances.

[80] The COUs entered by the plaintiff and defendant are contractual in nature. The COUs set out the obligations and rights of the parties in relation
D to the usage of services and facilities made available. Therefore, non-performance of any obligations contained in the COUs gives rise to the enforcement of such rights or obligations by the aggrieved party.

[81] Now, it is not in dispute that the COUs have set out the defendant's obligation to pay PSC. The rate of PSC payable to the plaintiff by the
E defendant is clearly prescribed by law, namely; the ASC, amended ASC and the present ASC.

[82] This court had earlier found that the new PSC rate is a statutorily fixed rate. Hence, the defendant's obligation to pay the new PSC rate to the plaintiff is indisputable notwithstanding the plaintiff's or even the defendant's
F qualms regarding the new PSC rate.

[83] Can the defendant now contend that it has no obligation to pay the new PSC rate just because it claimed that it has never agreed to the terms stated in the COUs? This court does not hesitate to answer this question in the negative. This court reiterates that the COUs are inconsequential to any and
G all aviation service providers' agreement (bilateral or even unilateral) or disagreement regarding the new PSC rate. Any and all qualms are not within the parties' discretion to refute the statutory force of the new PSC rate.

[84] Thus, as the PSC rate is prescribed by law, the defendant's obligation to pay the new PSC rate to the plaintiff remains enforceable regardless of
H whether the defendant has agreed to the COUs or not.

[85] Furthermore, it is severely unjust for the defendant to now claim that it has never agreed to the COUs, while on the extreme contrary, all their conducts throughout the years have clearly indicated unequivocal adherence,
I acceptance, and enforcement of the COUs. This court finds that the following conducts (in total contradiction of the defendant's denial) obviously evinced, in express terms, that the defendant has accepted the terms of the COUs and thereby are bound by the same:

(i) it is beyond doubt that the defendant has used and has continued to use the airport services and facilities in KLIA and klia2;

(ii) the defendant itself has specifically referred to, affirmed, and relied on the terms of the COUs. This can be seen in the following documents and correspondences:

(a) By AAB's former solicitor's letter dated 31 July 2015 to the plaintiff, AAB confirmed that there indeed was a contractual relationship between the parties based on, amongst others, the COU 2010:

> 4. Our client instructs us that the contractual relationship between you and our client is governed by, amongst others:
>
> (a) Civil Aviation Act 1969;
>
> (b) Civil Aviation Regulations 1996;
>
> (c) Conditions of Use for Kuala Lumpur International Airport Malaysia dated 1 September 2010;
>
> (d) ICAO's Policies on Charges for Airports and Air Navigation Services-Doc 9082; and
>
> (e) ICAO's Airport Services Manual – Doc 9137.

(b) In the pending Civil Suit No. BA-22NCvC-211-04/2018, AAX's own written submission dated 19 October 2018 unequivocally admits the following:

> 6. In 2010, the plaintiff and defendant had entered into various contracts known as "Conditions of Use For Kuala Lumpur International Airport Malaysia (copy revised as at 1 September 2010)" ("COU 2010") and subsequently "Conditions of Use For Kuala Lumpur International Airport (commencement date: 1st February 2017) ("COU 2017") as well as tenancies of various parcels in klia2 ("klia2 Tenancy').
>
> 7. To date, the COU 2017 and klia2 Tenancy are still being performed by both parties."

(c) In the same civil suit, *vide* AAX's own affidavit in reply affirmed by Chua Cher Lin on 6 August 2018, AAX has unequivocally admitted the following under oath:

> (a) As far as the defendant is concerned, all payments with regard to the Airport Charges and Outstanding Rent have been paid and that the defendant's accounts with regard to the COU 2010 and klia2 Tenancy are current.
>
> 11. The COU 2010 and klia2 Tenancy are still being performed by both parties. The defendant makes payment of the plaintiff's invoices as and when they are issued, and there is no outstanding amount due to the plaintiff as far as the defendant

A is concerned. This is demonstrated by the fact that the latest payment made by the defendant to the plaintiff was on 25 July 2018 for RM13,764,224.84.

[86] It is obvious without a shade of doubt that the defendant has now taken a completely contradictory position/stance in relation to the COUs against B the defendant's own admission and acknowledgment.

[87] This court simply cannot accommodate the shifting of positions/stances by the defendant. The defendant ought not to be allowed to willy-nilly shift the goal post as and when it suits its fancy and narrative. The old adage goes, if they have made their beds then they should lie in it. No man C can be allowed to go back on his own words and admissions.

[88] This caution against approbating and reprobating of stances have long been celebrated by the courts. The Federal Court's decision in the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 has decided the following: D

> When the parties to a transaction **proceed on the basis of an underlying assumption either of fact or of law** – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – **neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do** E **so**. (emphasis added)

[89] The same caution was further reinforced by the Court of Appeal in the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 which had held the following:

F > In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Pte v. News (UK) Ltd and Others* (1990) 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that **it is not possible to approbate and reprobate**. That means you are not allowed to blow hot and cold in the attitude that you adopt. **A man cannot adopt two inconsistent attitudes towards another: he must elect between them and,** G **having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance** (emphasis added)

[90] Thus, with all of the above in mind, the defendant here clearly ought to be estopped from denying the validity and enforceability of the terms of the COUs.

H *The Unsatisfactory Services Rendered By The Plaintiff And Set Off*

[91] The claim by the defendant that it is entitled to set-off in diminution or extinction of the plaintiff's PSC claim (due to the plaintiff's alleged non-performance of its obligations satisfactorily under COU 2017) is wholly an I unmeritable claim.

[92] This court is in full agreement with counsel for the plaintiff that the terms of the COU 2017 regarding any set-off or deduction from the airport charges are patently and unequivocally clear.

[93] Clause 3(n) of the COU 2017 clearly provides that the defendant shall not be entitled to make any set-off or deduction of any claim it may have against the plaintiff from the airport charges (which includes PSC):

> (n) You shall not be entitled, in respect of any claim you may have against us or otherwise, to make any set-off against or deduction from the Airport Charges payable to us where you have entered into these Conditions of Use in the capacity of a vendor of services at the Airport.

[94] Clause 3(n) further reinforces the fact that the PSC rate is statutorily prescribed and is totally independent of any dispute any aviation service providers might have against each other. No dispute as to performance can deter or diminish the statutory PSC rate payable. If indeed there are any qualms regarding performance, those qualms are entirely a separate matter which should be pursued separately and not made against (or to set-off) the imposition or the imposed rate of the statutorily prescribed PSC rate. This court reiterates that it shall not be manipulated to be the defendant's leeway to a 'backdoor' review of the Commission's decisions.

[95] This court cannot overstep its boundaries and encroach upon the Commission's vested statutory discretion in intending to impose a uniform and standardised PSC rate across all airports notwithstanding performance or non-performance of any airline service providers. If indeed the defendant was adamant that a uniform rate should not have been imposed, then the defendant has already been given all the opportunity to dispute the Commission's decision (which the defendant has not exercised and has omitted in totality). Neither did the defendant write any feedback to the Commission's Consultation Paper 2017 nor did the defendant filed for a judicial review within time. Leveraging the alleged non-performance of the plaintiff against the statutory PSC rate is obviously a backdoor review against the Commission's decision, which should not be allowed by this court.

[96] In addition to cl. 3(n), cls. 9(b) to 9(d) also provide that in the event of any planned or unplanned closure of KLIA and klia2, or the suspension of the airport services and facilities, the plaintiff shall not be liable for any loss and damage.

[97] Hence, by the terms of the COUs, the defendant is contractually barred from setting-off any sums against the outstanding PSC. By the defendant's own agreement under the COUs, the defendant cannot claim against the plaintiff for losses or damage in case of any planned or unplanned closure, or suspension of services and facilities of KLIA and klia2.

The Claim For The Late Payment Charge (LPC)

[98] It is to be noted that the calculation of the sums claimed by the plaintiff for the outstanding PSC has not been disputed by the defendant. Under the COUs, the plaintiff is entitled to enforce late payment charge ("LPC") against the defendant for late or non-payment of outstanding PSC claimed against the defendant.

[99] This court fully agrees with counsel for the plaintiff that in the present case, the plaintiff has discharged its legal burden of proof to prove its LPC claim by establishing these following two elements:

(i) The plaintiff has proven that there is a breach of the terms of the COU due to the defendant's failure to fully pay the PSC (at the new PSC rate) which resulted to incomplete payment of the entire seven PSC invoices; and

(ii) The plaintiff has proven that the COUs contractually prescribe an LPC clause for late or non-payment of PSC. Clause 3(k) prescribes an LPC clause specifying that the plaintiff is entitled to impose LPC at the rate of 12% per annum on any outstanding charges due and payable.

[100] It is this court's finding that since both these elements have been established by the plaintiff, the evidential burden of proof has now shifted to the defendant as the defaulting party to prove that the LPC rate is unjustifiable. However in the present case, the defendant has failed to adduce any evidence at all to prove that the LPC rate as prescribed under the COUs is unjustifiable. Therefore, the plaintiff is entitled to the LPC sums claimed herein.

[101] This court finds valuable guidance in the recent Federal Court case of *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunication Sdn Bhd* [2019] 2 CLJ 723 in which the Federal Court has held the following:

> [70] We turn now the issue on burden of proof. *The initial onus lies on the party seeking enforce a clause under section 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages including the sum stated therein, if any*.
>
> [71] If there is a dispute to what constitutes reasonable compensation, **the burden of proof falls on the defaulting party** to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. (emphasis added)

[102] In view of all the deliberations and findings above, this court is satisfied that the defendant has failed to raise any triable issue. Therefore, this court allows the plaintiff's application in encl. 6 with costs of RM8,000 to be paid by the defendant to the plaintiff.

[103] Since encl. 6 of suit 817 is allowed by this court, as mutually agreed by both parties (that the decision in encl. 6 of suit 817 will bind the other two suits), this court therefore allows encl. 5 of suit 816 and encl. 5 of suit 58 with costs of RM8,000 to be paid by the defendant to the plaintiff for each application. Thus, this court accordingly orders summary judgments to be entered under encl. 6 of the present suit, encl. 5 in suit 816, and encl. 5 in suit 58 against the defendant.

The Striking Out Applications By The Defendant In Enclosures 8 (Suit 817), 10 (Suit 816) And 20 (Suit 58)

[104] The defendant had applied to strike out the plaintiff's claims in all the suits involving the plaintiff. In view that this court has already allowed the plaintiff's application for summary judgment in all of the three suits on the ground that the defendant has failed to raise any triable issue, thus the merits of the plaintiff's claims have already been determined. Therefore, the defendant's applications to strike out the plaintiff's claims are now merely moot or academic and are also barred by the principle/doctrine of *res judicata*. In respecting the parties' own agreement (that the decision in encl. 6 shall bind and be applicable to all suits), this court cannot go against its own decision to allow summary judgments and entertain any application to strike out the plaintiff's claims. Thereto, this court hereby orders that all of the defendant's three applications (encl. 8 (suit 817), encl. 10 (suit 816) and encl. 20 (suit 58)) be struck out and with no order as to costs.